Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

THEOPHILUS GREEN, et al.,

Petitioners,

v.

MARY ANN BENDEN, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

Whether a court's broad discretionary powers can suspend default judgement, following notice and a hearing in compliance with the Federal Rules of Civil Procedure, including Rule 11, when both the district and appellate courts have evidence the default is part of an intentional strategy to circumvent due process to avoid addressing plaintiff claims, in violation of the plaintiff's 14th Amendment civil rights under the U.S. Constitution.

Whether the current Illinois Governor's Executive Order 2000-4, issued to address violations that circumvent protections provided black and minority males under Furman v. Georgia, (1972), imposes a greater responsibility on the state, district and appellate courts to insure due process and procedural integrity, when evidence of misstatements and procedural violations in the state, district and federal courts obstruct due process.

Whether the district court's discretionary powers can grant defendants' rights at trial, or the appellate court's discretionary powers can grant defendants' appeal rights, when the defendants are subject to a pending default motion in compliance with FRCP.

Whether the appellate court's discretionary powers can grant the defendant new defenses, not raised at trial, in their ruling or denial for rehearing.

Rule 24.1(b) Statement

Pursuant to Rule 24.1(b) of the Rules of this court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Plaintiffs

Associated Psychological Services,
Psychological Solutions, P.C.
Related Clients and Staff

Defendants

Michael Palermo, Individually,
Director, Illinois Department of Professional Regulation
Health Care Service Corporation d/b/a Blue Cross Blue Shield

Rule 29.6 Statement

Pursuant to Rule 29.6, petitioners state that they have no parent companies or non-wholly owned subsidiaries.

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Petition for a Writ of Certiorari

Opinions Below

The opinion of the 7th district court of appeals is reported at 281 F. 3rd 661 7th Cir, 2002. The judgments of the District Court is unreported. (Appendix B1-B4)

Jurisdiction

The court of appeals' judgement was entered on February 21, 2002 . A timely petition for rehearing was denied on March 20 , 2002 and amended March 21, 2002. The jurisdiction of this court is invoked under 28 U.S.C. chapter 1254(1).

Constitution and Statutory Provisions Involved

The Supremacy clause of the constitution provides in relevant part: "The laws of the United States*** shall be the Supreme law of the Land*** any Thing in the Constitution or Laws of any state to the contrary not withstanding". U.S. Const. Art. VI cl.2.

The Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature...." They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Paragraph 1 Rule 1.

Statement

The essential facts giving rise to Dr. Theophilus Green's petition are all undisputed.

In this civil rights conspiracy action, the district court ordered the defendants to answer the Second Amended

complaint filed April 26, 2000, which included the addition of new plaintiffs, Associated Psychological Services, Psychological Solutions, and Related Clients and Staff, within 20 days. Mary Anne Benden and Michael Palermo are Illinois prosecutors whom plaintiff Green, a black psychologist, alleged knowingly unlawfully sanctioned his psychology license in their position as prosecutors for the Illinois Department of Professional Regulation.

Health Care Service Corporation d/b/a Blue Cross Blue Shield withheld insurance reimbursements based on the removal of Dr. Green's license by the Illinois Department of Professional Regulation. The Wisconsin Department of Professional Regulation remain a party to this case at the district level. The defendants failed to file an answer by May 16, 2000, instead relying on variously styled "Memorandum." Dr. Green filed a motion for default and default judgement (docket summary, entry 78, dkt. 87) and sanctions, (dkt. 89), for all plaintiffs.

By operation of law under the FRCP, all plaintiffs in the caption of the final judgement, are entitled to their relief as sought, without the requirement of appeal.

The Illinois defendants sought sovereign immunity under the 11th Amendment, and the Younger Abstention in their defenses to the Complaint and the Amended Complaint. HCSC alleged there was no evidence of a conspiracy in which they were participants in its answer to the Amended Complaint. Neither of the defendants filed motions to have their previous answers under the Complaint and the Amended Complaint stand for the moving Second Amended Complaint.

Six months after the complaint was filed, in February, 2000, the Governor of Illinois issued Executive Order 2000-4, suspending implementation of the death penalty, thereby overriding written state law and policy. This order was issued to address abuse of police, prosecutor and trial court discretionary powers throughout the state that knowingly unlawfully circumvented constitutional protections provided

under *Furman v. Georgia,* 408-U.S. 238, (1972). At the time of the Governor's executive order, Illinois had exonerated more (13), prisoners, predominately black and minority men, than it had executed (12), since the resumption of the death penalty in 1977, following the implementation of DNA evidence.

A temporary injunction hearing was held, later termed an evidentiary hearing in the final order, but no hearing was ever held to address the application of the Younger Abstention or the elements of conspiracy.

Dr. Green's complaint stated the offenses alleged occurred over 12 years in the past, before he became a covered party of the state psychology licensing act, and in any event, outside of the Statute of Limitations for any violations. The issue, in contest, was his verification of another psychologist's training. There was no contest by either defendant that the document in question were never used for any official decisions.

In his complaint, Dr. Green provided evidence that another psychologist, who was white, signed a similar document, but was not disciplined. That psychologist's (Reginald Orsolini) documentation was also not used for any official decision. Dr. Green provided affidavits that the prosecutors used their discretionary powers to bring false charges to force his perjured testimony against another psychologist. When he did not acquiesce, they used their discretionary powers to create a violation that did not exist. The prosecutors later persuaded the administrative law judge to use his discretionary powers to create new charges for discipline after the hearing had closed. The prosecutors and IDPR then claimed immunity for their actions under qualified and sovereign protections as state officials.

In this appeal, Dr. Green further alleges the district court used its discretionary power to rule Dr. Green failed to make a race based claim that was clearly stated in Count Two in the Second Amended Complaint when it dismissed his complaint. The district court further erred when it used its discretionary power to deny a motion for a special master to clarify the

professional psychology standards at issue, and allowed the defendants to hide their official mischief behind defenses of qualified and sovereign immunity on the state level and due process violations in the federal courts.

In dismissing the claims, using his discretionary powers, the trial court allowed the defendants the further protection of his own judicial immunity by ruling "with prejudicious", and thus denied the plaintiffs due process. Dr. Green was unlawfully sanctioned for actions not included in the original complaint, but which were entirely legal by the standards of his profession. To bring the charges, the Illinois prosecutors used their discretionary powers to go to the refuse can to retrieve discarded documents for another psychologist, and an application that was denied.

The determination of his offense, Dr. Green alleged, resulted because actions common and accepted in the field of psychology, would be violations in the field of law, and the prosecutors were ignorant of the law they sought to enforce. He alleged that the prosecutors began their conspiracy when they procured an old complaint number to justify the charges. Thus, the same IDPR complaint number is on record for two separate and distinct offenses, 12 years apart, and this violation was known to all supervisors and directors in the IDPR.

The old charge number, 93-5867, resulted from a retaliatory action brought against Dr. Green by a parent whose child was removed from the home in 1993. Because of a mandated reporter state law to report child abuse, Dr. Green was required to report the parent for child abuse to the Illinois Department of Children and Family Services. The new charge alleged violations in 1986. Dr. Green was first licensed in Illinois in 1990. Dr. Green alleged he was disciplined, because of a mandated reporter law that brought him to the attention of the law, then denied immunity protections required by the same law. He further alleges that it is part of an ongoing pattern and practice in Illinois to deny black and minority men of every station of life, their 14th Amendment rights.

The remedy the Illinois defendants sought for his offenses were 24 hours of continuing education units for a minimum of 8 years, or 192 hours c.e.u., each hour, considered a class credit hour. It was the equivalent of a separate bachelor's, masters and doctorate degree. The discipline served to arbitrarily and unconstitutionally remove not only his license, but all evidence of post secondary education. *(Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Illinois does not mandate c.e.u. credits as a condition of licensure. The Illinois defendants knew that their actions would also compromise his contract rights as an insurance provider and notified HCSC of their actions.

The administrative law ruling also included mandatory psychotherapy reviewed by state officials, in violation of his confidentiality and privacy rights, for a minium of eight years. The therapy resulted from the administrative law judge's diagnosis of Dr. Green's objections during trial. Dr. Green's district court pleadings alleged the discipline constituted cruel and unusual punishment, in violation of the Eighth Amendment, as it would result in "reeducation" and "brain-washing."

HCSC knew, and filed pleadings in the case that it had in its possession documentation, that the allegations against Dr. Green even if true, were protected by mandated reporter immunity tied to the reporting of child abuse. Further, HCSC maintained contracts with Dr. Green and the other plaintiffs which required licensure by the "Illinois Department of Registration and Education." The agency authority which HCSC used to terminated the plaintiff's rights to contract benefits was the "Illinois Department of Professional Regulation."

Dr. Green alleged HCSC had a contractual obligation to inform IDPR of his immunity and their state department contradictions under his contract with him and their contract with the other included plaintiffs who were denied benefits as policy holders. HCSC further had a responsibility to inform both he and his clients of the federal subpoena, as implied responsibilities under his reimbursement contract with HCSC,

before they could deny contract benefits. His complaint alleged that HCSC knowingly withheld that information from IDPR as well as their intention to deny Dr. Green's patients their insurance reimbursements to him. These acts and non-acts were in furtherance of the conspiracy to deny Dr. Green the benefits of his education and for their personal gain to justify their breach of his reimbursement contract. Under 42 U.S.C. 1983, it is not a requirement that conspirators communicate with each other, but that they be united behind a common purpose. The purpose, under which the Illinois defendants and HCSC united was to retaliate against Dr. Green for refusing cooperate with their perjury schemes in another investigation and entitle HCSC to withhold mental health benefits to a substantial number of its insureds.

Dr. Green sought sanctions against the defendants and their counsel for their actions, but the district court used its discretionary powers to deny them, without a hearing, in violation of FRCP Rule 11. Associated Psychological Solutions, and Psychological Solutions, P.C. and Related Clients and staff joined the suit to seek damages for HCSC's removing their files to the Federal Bureau of Investigation without their permission, the compromise to their jobs and services resulting from the compromise of Dr. Green's professional license and their confidentiality rights.

The clients in this case included the African-American Police League, several standing Chicago Police and Fireman, and the Loop Lab School, a minority owned private school. Contact from the FBI affected their careers and concern for their privacy rights which might be breached when seeking help for their children. At least one former client is now facing the death penalty. The plaintiffs further alleged that the subpoena used to justify the release of their files was defective and HCSC knew or should have known it at the time they released their files. They also claimed damages for HCSC contract benefits which they were unable to utilize because of any other minority providers with Dr. Green's credentials.

The violation of confidentiality rights of the health care subscribers by HCSC, in turning over patient files, without notice or a hearing, in the face of an obviously defective subpoena, was to knowingly further the conspiracy of IDPR to deny Dr. Green the rights of privilege of his education and professional license.

The result of the actions of all of the defendants in this case is that black males and their clients do not enjoy the same rights and protections under the law as those of other races. Black and minority clients and their providers do not enjoy the cultural validation and rights to enjoy benefits under insurance contracts as other races, and black male psychologists in Illinois suffer the worst of both worlds.

While this writ and the appeal from which it is removed is only for Dr. Green, it nevertheless involves the rights of the other included plaintiffs who were denied rights of appeal by the appellate court. For that reason, plaintiffs not plaintiff will be used throughout this writ, as the plural form accurately describes the parties whose rights were at issue in the lower courts.

1. **State Actions and their impact on federal protections.**

The plaintiffs in this case allege that the existence of the Illinois Governor's Executive Order mandates a vigilance on due process violations on both the district and appellate courts, with particular emphasis on black and minority men in the criminal, civil and administrative law courts. The plaintiffs in this case allege that because of that Executive Order, and their compliance with the FRCP, that they cannot be denied the right to default judgement for all relief sought and the right to sanctions against the offending parties. It is their belief that neither the district nor appellate courts have discretionary power to remove those rights, even with notice and hearing, when the violations result from an intentional legal strategy on the part of a litigant, and deny due process rights under the U.S. Constitution.

Further, without the real execution of sanctions threatened under FRCP Rule 11, those rules are without enforcement power. Rather than the Governor's executive order acting as a restraint to abuse of process, it has served to notice opposing counsel of black and minority men regardless of their station, throughout the state of Illinois, that their due process rights can be ignored, without sanction, without consequence, in violation of the law. As a result, any future state executive orders would constitute notice of an "open season on protected parties", rather than a notice to "cease and desist", as there would be no consequence for its violation. Because these procedural violations have lead to increased litigation costs, and lengthy, timely procedural battles, they have denied the plaintiff's speedy implementation of justice afforded them under the constitution.

Using *Marbury v. Madison* 5 U.S. 137 (1803) as their authority, the plaintiffs allege that the U.S. Constitution remains inviolate, as are the FRCP which govern their protection. State and federal government officials do not have authority to use their discretionary powers, when that discretion results in a denial of due process. Further, the plaintiffs allege that neither government court representatives nor their representatives in a legal proceedings, can retreat to 11th Amendment constitutional and qualified immunity to avoid accountability for their actions which they knew or should have known could result in a due process violation. Finally, the plaintiffs state that If a court is properly noticed of a sanctionable activity, those sanctions cannot be ignored on the court's discretionary authority alone.

The plaintiffs alleged, that because the FRCP are the governing rules for federal courts, the district and appellate courts do not have authority to ignore procedural violations under their discretionary powers, when the consequence is the denial of due process and the obstruction of law or justice as sought. The district and appellate courts in this case erred when they terminated this case without granting a default

judgement on all relief sought, for all plaintiffs, including injunctions and a hearing for determination of sanctions following intentional attempts to violate the plaintiff's due process rights. Further, the lower courts erred when it granted the defendants implied rights of res judicata and collateral estoppel, to which they are not entitled. Because they failed to comply with a lawful proceeding, the defendants have no rights of defense in subsequent litigation accorded lawful litigants. Finally, because of the consumption of time by false defense applications, the defendants' actions have barred the plaintiffs from brining any subsequent actions because of the Illinois Statute of Limitations applicable to the federal courts.

The plaintiffs sued under 42 U.S.C. sec. 1981 and 1983 and cited *Hampton v. Hanrahan*, 522 P. Supp. 140, 144 N.D. Ill, (1981) as their authority for a jury trial, as that 7th Circuit precedent required that a jury determine all conspiracy violations, not a judge. The district court further erred when it used its discretionary authority to overrule the opinion of its own circuit, determining that no conspiracy existed, without notice or a hearing, and dismissed the case.

Dr. Green has training and experience as a prescribing psychologist, a licensed clinical psychologist, a forensic psychologist, a drug and alcohol abuse psychologist, an organizational psychologist and a child and adolescent, inpatient and outpatient, specialist. While his legal credentials were not an issue for the trial court, he may also have a degree in law and a license to practice before a court of law.

As a result of the collective actions of IDPR and HCSC there are no black male psychologists available in any way equal to the percentage of either the black or total population in the Chicago metropolitan area for majority races. Of nearly 350 psychologists in the 2002 Chicago Yellow page psychologist listing, less than five are black males and only one black male licensed psychologist with training and education in clinical, forensic, substance abuse and psycho-pharmacologic psychology is available to black or white Chicagoans. That exception is Dr.

Green, whose license is the subject of this writ.

B. **The threat to the public by these discretionary violations**

The consequence of the conspiracy of the defendants is that insurance benefits to black and minority policy holders of HCSC advertised under Blue Cross Blue Shield are largely unavailable at the doctoral level by black male psychologists. Because there is no uniformity of law or professional license review in Illinois, there are no psychologists qualified under the IDPR, IDRE and HCSC contract requirements to provide the services under the policies as written. The ultimate result is that contract services purchased by black and minority policy holders under HCSC contracts, as well as those of all other insurance contracts in Illinois who service minorities, cannot be lawfully fulfilled and this knowledge was at all times known to the Illinois defendants.

The collaboration of action of these defendants in their conspiracy constitutes intentional and ongoing insurance fraud, as benefits contracted for, cannot knowingly be provided to minority health care subscribers. Blue Cross Blue Shield therefore knowingly contracts for services that it knows it can deny for failure to comply with state law and their own contracts. The conspiracy also grants the state prosecutors the right to isolate and prosecute black and minority psychologists, under authority of the law.

The acts of HCSC, d/b/a as Blue Cross Blue Shield are consistent with a national policy to deny psychologists due process rights in federal courts after more than 20 years of managed care litigation. In a notice to the appellate court, the plaintiffs filed evidence from a letter by Russ Newman, Ph.D. J.D, dated February 13, 2002, that the American Psychological Association APA has not been "able to bring a managed care company, (i.e. BCBS of the National Capital Area) into the courtroom" after nearly twenty years of managed care

litigation. It is apparent that while procedural laws are on the books and due process rights are well established,, they are not equally applied or uniformly enforced when well funded insurance companies and state agencies are involved. The cost of litigation itself, in the face of due process obstructions to the process, precludes minority plaintiffs from asserting their rights.

The cumulative result of unfair licensing practices of IDPR and contract breaches of HCSC is that psychologists and black and minority men in Illinois have no enforceable rights under written contracts, no constitutional protection for professional rights, no contracted mental health insurance benefits that can be effectively utilized by those seeking cultural validity from members of their own race, no protections under Illinois administrative law, no rights under the Illinois and Federal Rules of Civil Procedure, no privacy protection from intervention of federal government into their personal lives, no enforceable confidentiality and privacy rights, no right to practice and enjoy employment under the benefits of a professional license, no immunity protections when those immunity protections are clearly established, and no rights under appeal or rehearing. That policy is at all times known and supported by the highest legal authority in the state as the name of the current Illinois attorney general, Jim Ryan, appears on all documents in this case.

Such officially approved actions by state lawyers have rendered psychotherapy, preventive psychotherapeutic services and forensic criminal defense services unavailable for a large metropolitan community and discouraged future mental health professionals from entering the field to provide the same services. The denial of preventive services through art and artifice is in violation of the spirit of *Furman v. Georgia,* (1972).

Dr. Green presents this petition to seek expeditious certification of his default judgement, default judgement for all parties in the caption on their behalf, a permanent injunction

for all acts against his license, and sanctions for all counsel as sought during the trial phase. The actions of the state prosecutors, crossed state lines to Wisconsin to conduct a knowing fraud in knowing violation of the law and collusion with their trial counsel. Their counsel were required under the Illinois Rules of Professional Conduct to comply with the law.

When counsel for both defendants actively conspired to avoid answering the complaint and the default, crossed state lines and did in under flagrant violation of law and official procedure, they ceased to be legal representatives and became co-conspirators with their clients in an unlawful action. Even though their actions were with the knowledge and cooperation of state officials, they were essential a criminal enterprise. Accordingly, the sanctions of counsel in this case should be equal to that of their clients, and trebled because of acts in violation of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S. C. Chapters 1961-1968, (1970).

REASONS FOR GRANTING THE PETITION

The issues in this case are the most significant of any to be decided in nearly 200 years. In *Marbury v. Madison,* 5 U.S. 137 (1803), the U.S. Supreme Court declared that in any conflict between the Constitution and a law passed by Congress, the Constitution must always take precedence. In this case, the plaintiffs ask the court to address the conflict between law as written under the U.S. Constitution, and protected by the Federal Rules of Civil Procedure, and the discretionary powers granted its representatives for the protection of those laws.

1. District Court Conversion of Memorandum to Answer

The trial court's discretionary conversion of a "Memorandum" to a lawful "Answer" without notice to either party and its termination of the case, with prejudice, for all

captioned parties, without a ruling on the motion for default judgement or sanctions, was an err in violation of the FRCP and the 14th Amendment civil rights of Dr. Green and the other plaintiffs.

During the trial phase, both the Illinois defendants and HCSC informally conversed with the trial judge in open court and asked the judge if they could allow their previous answers to stand as answer to the newly filed Second Amended Complaint. The judge indicated no objection. The defendants filed no motions or sought any orders to clarify or certify this informal conversation. The defendants subsequently filed a series of "Memorandums", none of which were responsive to the Second Amended Complaint or to the additional party's claims.

The trial court subsequently converted, with notice to all parties, a previously filed "Motion to Dismiss" from the Illinois defendants into a "Motion for Summary Judgement" which the plaintiffs declined to answer. In declining, the plaintiffs preserved their right to contest the failure to comply with Rule 12a as there was no "Motion to Dismiss" responsive to the Second Amended Complaint on file (Dkt, 48). Also, as the docket summary clearly confirms, the defendants did not motion the court to accept any of their prior objections or defenses, including their rights under the11th Amendment violations, the Younger Abstention or federal civil rights conspiracy legislation.

The trial court issued its first final ruling on September 28, 2000 and used as the basis for its action one of the "Memorandums" on file. The trial court dismissed the plaintiff's complaint. The plaintiffs appealed, and the case was remanded because of a procedural error on the part of the trial court. During the period the error was corrected, the plaintiff's filed a motion for default and default judgement, which was duly served on all parties and replied to by HCSC.

Despite the notice of a procedural failure, and notice

for default and default judgement, none of the defaulted defendants acted to correct their lack of a timely filed answer. The district court issued a subsequent final order relating back to the September 28, 2000 decision on January 30, 2001 and the plaintiffs appealed again. The appeal for the Illinois defendants was remanded for another procedural error. A final order for the Illinois defendants was issued June 1, 2001.

During the second appeal for both defendants, the plaintiffs cited the default, among a series of other objections to dismissal. The appellate court accepted an appeal for plaintiff Green, but would not accept an appeal for Associated Psychological Services, Psychological Solutions, and Related Clients and Staff.

In its ruling, the appellate court indicated that the district court "never decided any of their (the additional plaintiff's) claims", and further denied the right to default to the appellant as well. The court further erred when it used its discretionary power to remove Benden and Palermo from the case, though they were not excluded in the appeal. The appellate court reported that the other included plaintiffs were unrepresented by counsel before the district court, based on the defendant's statements alone. The appellate court denied the default against HCSC accepting their written affirmation that they had replied to the moving complaint and complied with Rule 12a, when in fact the docket summary did not support their facts.

FRCP Rule 12a requires that a defendant respond to a lawfully served complaint "within 20 days" after the service of the complaint Accordingly, the district court in its Minute Order of April 26, 2000, ordered the defendants to reply to the plaintiffs' Second Amended Complaint by May 16, 2000. As the docket summary will show, neither the Illinois defendants or HCSC complied. On May 10, 2000, the defendants filed five "Memorandums," (Dkts. 40, 41, 42-1, 42-2, 43) and one Response (Dkt. 43-2) but none purported to serve as an

"Answer" or a "Motion" as required under Rule 12a. The plaintiffs allege the defendants intentionally filed "Memorandums" and "Responses" and did not seek any hearings responsive to their pleadings, to limit plaintiff answers and hearings on their claims.

A "Memorandum" is not considered a responsive answer under the FRCP. The federal courts have ruled that a memorandum is not an "Answer" or a "Motion"and instead serves as a "brief note, in writing of some transaction or an outline of some *intended* instrument." 43 P. 896, 899.

The docket summary reflects that the trial court judge gave the defendants wide latitude to respond or amend their actions and the defendants did not avail themselves of his many opportunities. Any one of the five "Memorandums" could have been altered to meet the requirements of the law by motion to the court. HCSC had a counter-claim on file which could have been amended to meet the requirements of Rule 12a, but it was dismissed (dkt. 79), on their own oral motion before a final ruling. The defendants, Benden and Palermo, filed affidavits on June 23, 2000 which could have been amended on a motion to the court to meet the requirements of Rule 12a.

The Wisconsin defendants, remaining defendants in this case, from which this appeal was removed, properly followed the law in their answer and filed a "Motion to Dismiss" (Dkt. 74) in accordance with Rule 12a. The district and appellate court erred when it allowed HCSC and the Illinois Defendants to avoid complying with the FRCP and held the Wisconsin defendants to the legal standard.

The Illinois defendants ignored the default notice. Under FRCP Rule 60b, the defendants could have motioned the court to set aside its judgement to file a proper answer or have motioned the court to have the plaintiffs Associated Psychological Services, Psychological Solutions, P.C. and Related Clients and Staff removed from the case and the caption, but did not do so. By any conservative estimation, the

defendants had 13 opportunities to comply with Rule 12a, five "Memorandums" they could have converted, one "Response," two affidavits they could have converted, three final orders which they could have appealed or asked to be set aside while they corrected their defect, and finally the default and default memorandum notice. This does not include the other opportunities provided by their appearance before the court.

In their Appellee Reply to the district court ruling, the HCSC defendants noted that the trial court judge gave them authority to correct their pleadings. R. Transcript, vol 8, p.4, *ll.* 6-21[e.g., Court:

> "I don't see that there is anything to be made by forcing people to re-file things"]; App. Brf., p 19 [The defendants asked the Court to allow their premature filing to stand as answer to the subsequently admitted complaint and the court agreed."]) Nonetheless, on May 16, 2000, HCSC filed a motion to dismiss or in the alternative, a motion for summary judgement responsive to the Second Amended Complaint." *App. Brf., p. 14.*

The docket summary is the official record of the case, not the judge's verbal observations. There is no evidence in the docket or evidence in the proffered appellate court transcript that identifies the intent of the court's observation. Based on HCSC's pleadings, it remains uncertain which "people" (HCSC or the Illinois defendants) the trial court was referring to, or whether the defendant's were referring to the "Complaint" or the "Amended Complaint " in their conversation with the court. The lack of specificity, along with the defendant's failure to specify it by their own answer or motion to the court, renders the judge's verbal observation unenforceable under the void-for-vagueness doctrine, as well as the procedural defect.

There are *no* defendant entries in the official docket

summary for May 16, 2000. This statement that there was constituted an intentional, willful and purposeful violation of Rule 11, and the trial and appellate courts erred when they failed to grant the default and sanctions for intentionally failing to file a lawfully acceptable answer.

Because there is no record of an answer in compliance with Rule 12a for HCSC, and because the HCSC counsel filed intentional misapplications before the district and appellate court, the default judgement should be granted and the sanctions against defense counsel should have followed.

Because the Illinois defendants failed to respond to the April 16th order as well, the district and appellate courts erred when they failed to strike their memorandums, responses, objections and appeals as unresponsive. The fact that the Illinois defendants did not compound their negligence with an intentional misdirection to the court, as did HCSC, did not alleviate their default.

The trial court erred when it based its final orders on defense memorandums (Dkt. 41-1) and (Dkt. 42-1) as this case could not lawfully proceed until an answer had been filed. All defense motions, all defense applications, all defense responses, and all defense contests to any plaintiff claims, including their responses in appeal and appellate objections to the other included party representation, must accordingly be stricken for both HCSC and the Illinois defendants.

The trial court entered the plaintiff's notice of default judgement January 9, 2001, (Dkt. 91) then terminated the case with prejudice 21 days later, without an answer from either defendant. As all defendants were represented by counsel, even though all counsel had not filed a notice of appearance, the defendants had notice that they were required under the FRCP to respond within 20 days. They did not do so, consistent with their ongoing pattern of ignoring FRCP requirements. The trial court, upon terminating the case for HCSC in 21 days and for the Illinois Defendants four months later, did not abridge any

of their rights under 12a before issuing its final order.

Accordingly, the defendants are in default, and as that default has persisted for more than a calendar year, and the defendants have not appealed or sought any toll of their rights to object to the motion for default, the trial court has no other authority, under Rules 60b, 55a and 54c, than to issue a default order and default judgement and erred when it failed to grant the plaintiffs their relief as sought.

The defendants were required under 12(b) to assert their claims of representation at the trial level or preserve the defense of "insufficiency of process," which is the legal question in contest, under Rule 12(h), when questioning the propriety of legal representation. Because the defendants failed to file their objections at the trial level, and allowed the case to end with a default, they waived any objections to the outcome.

By the failure of the defendants to answer the complaint or motion the court to remove the plaintiffs, Associated Psychological Services, Psychological Solutions, P.C. and Related Clients and Staff from the caption, the other included parties and their representation achieved legitimacy of their claims. They survived the case to judgement in the caption, and entry by the court clerk and are therefore entitled to their default. The defendants allowed the case to end without having any of their 19 possible defenses under 8c to the Second Amended Complaint entered.

2. **The appellate court erred when it permitted the defendants appeal rights, while denying those same rights to all plaintiffs in the caption of the final order.**

At all times, in all pleadings, all plaintiffs began their applications to the court by stating, "Theophilus Green, pro se, and Theophilus Green on behalf of plaintiffs Associated Psychological Services, Psychological Solutions, P.C. and Related Clients and Staff in this action," and thereby evidenced

Dr. Green's representation of all plaintiffs. There was no question that the court and the defendants knew Dr. Green was representing all captioned plaintiffs. The literal Latin translation of "pro se" is "on one's own behalf;" it does not mean that the person proceeding does so without a legal degree. There was no real or intended misrepresentation to the court or any represented party.

Moreover, as the threat to plaintiff Green's professional credentials were real, his own license to practice psychology compromised by the conspiracy at issue, he was justified and even required to withhold further credentialing, as he too was noticed by the Illinois Governor's Executive Order and evidence of grave due process defects in Illinois.

The issue of the representation of the other included parties was not before the appellate court and the defendants filed no counter-appeal placing them before that court. The issue of representation should have been addressed by the defendants at trial court or in their many "Memorandums" as the defendants apparently consider them their lawful answer.

In its ruling, the appellate court based its denial of relief to the other included plaintiff's claims on defense claims of representation based on *Lewis v. Lenc-Smith Mfg., Co.,* 784 F. 2nd 829, 839-31 (7th Cir, 1986). However, the appellate court erred in basing its ruling on that case. In that case, the defendants were not in default, having answered a legally noticed complaint, and there was no motion for default judgement pending. Also in that case, the defendants raised their contest of representation and credentials during the trial phase, not at the appellate level. Finally, in *Lewis v. Lenc-Smith Mfg., Co.*,(1986) there was clear and uncontested documentation that the parties filing the action at issue were not lawyers. None of those three issues are true for this matter.

Further, neither the defendants, nor the appellate court provided any precedent that provided that a moving complaint could be ignored by the failure alone, to file a notice of

appearance, that was not addressed at trial. Likewise, they provided no precedent that a moving plaintiff's right to default or appeal, could be denied without notice to, or leave from, the convening court of authority.

As the Illinois Governor had served notice to the public by his Executive Order that he was unable to insure 14th Amendment protections and due process rights to minorities, the failure of the appellate court to revisit its ruling in the face of a due process violation, rendered the U.S. Constitution unenforceable for psychologists and black and minority men not only in Illinois, but the entire 7th Circuit which includes Wisconsin and Indiana.

As Dr. Green's had professional licenses in each of those states, the failure of the 7th Circuit to enforce due process mandated the timely and expensive visit to the U.S. Supreme Court. The appellate court's actions placed an unfair burden on the minority plaintiffs, following as it did a lawfully motioned default and default judgement hearing before the lower courts.

The defendants violated FRCP Rules 8d, 11, 12a, 12b, 12h, 55a, 54c, 60a and 79a, ignored a default notice, prevailed at appeal and violated or ignored virtually every state statute, including the Statute of Limitations, every contract requirement, and every major state and federal civil court procedural requirement.

The defendants in this case had at least thirteen opportunities to correct their default following notice of their default and the motion for default judgement. Each time they failed to do so, not individually, but collectively, and neither the Illinois defendants nor the HCSC defendants claimed any error or mistake as a defense. The actions of these defendants must therefore be construed as purposeful and part of common legal strategy in furtherance of a conspiracy before the court. To allow the defendants to fail to address the issues of the plaintiffs in the caption during the trial phase, yet deny the

plaintiffs rights of default and appeal, is a denial of due process, and a violation of FRCP Rules 12a, 54c, 55a, and 8d.

In furtherance of the appellate court's error regarding credentialing, the plaintiffs noted in their Petition for Rehearing En Banc, that the Illinois defendants included two names on all their briefs who also failed to file the necessary documents for appearance. Attorney General Jim Ryan and Solicitor General Joel D. Bertocchi, were listed as counsel to all Illinois defendant actions, but failed to sign the same appearance documents.

The appellate court erred when it struck the application of the additional plaintiffs for default and appeal rights, without notice or a hearing to either party. As the parties whose notice of appearance the appellate court ignored were white, and the parties it chose to challenge where black, the appellate court clouded their position as objective arbiters of fact and raised further issues of 14th Amendment violations in Illinois.

As the appellate court apparently assumed that the state officers had the mandatory legal degree, it could also be assumed that all parties at the trial court had independent knowledge of Dr. Green's legal credentials, because there was no challenge. The appellate court lacked authority to substitute its assumptions for issues, not contested as fact, during the trial phase.

There is no evidence available to the district or appellate court that the failure of plaintiff Green to sign a notice of appearance, in representation of the other included parties, was anything but an error or mistake, like the failure of the attorney general and solicitor general to file a similar notice of appearance. There was no evidence presented to the district or appellate court that, like many psychologists, (including Dr. Lisa Grossman, who is white, and testified at the temporary injunction hearing), Dr. Green was not a licensed lawyer, as well as a licensed psychologist.

Unlike the plaintiffs in *Lewis v. Lenc-Smith Mfg. Co.*,

(1986) noted by the appellate court in their ruling, no claims to documentation of the legal credentials of Dr. Green or contests of his representation of the other plaintiffs were ever filed. Because this case was one of contest of professional psychology credentials, Dr. Green was justified in avoiding any contest of his other professional credentials. Further, he was entitled to do so under the FRCP, which waived the defendants' right to contest "insufficiency of process" if it "is neither made by motion under this rule nor included in a responsive pleading...." (FRCP Rule 12h).

The formal docket summary shows no evidence the defendants filed a responsive pleading or a proper objection to the complaint at issue, no motions to strike either the other included parties from the caption or the representation of their claims by Dr. Green and no motion to have their previous objections accepted for the moving complaint.

If a lawful objection to Dr. Green's failure to file a notice of appearance had been raised during trial, there were numerous defenses or alternatives available to him and the other plaintiffs. Given proper notice, the plaintiffs could have corrected their error by filing a proper notice of appearance, with leave of the court. During the temporary injunction hearing of April 4-5, 2000, more than forty of the other included plaintiffs appeared, all whom were prepared to sign the complaint as pro se if that been a requirement.

Neither the court, nor the defendants, were under any impression that the addition of thousands of other pro se clients would have been an obstacle for Dr. Green. The defendant's decision not to contest Dr. Green's representation of the interests of the other included plaintiffs was both in the interest of judicial efficiency as well as court decorum and order. Neither the district court's failure to address their claims or the appellate court's speculations about their representation, constitute the basis for denying the other plaintiffs due process claims, without notice or a hearing, when this case was

terminated with prejudice.

Further, both the district and the appellate courts failed to note there was no delay in the proceedings caused by Dr. Green's representations. The integrity of the legal process was at all times respected and protected because the other plaintiffs, at all times maintained "shadow counsel." At all times, and for all plaintiff issues, their rights and privileges were monitored by licensed Illinois lawyers, either in the courtroom or available by phone. Because the ongoing and lower court proceedings consumed a great deal of time, because the proceedings were exceedingly costly, and because the defendants did not motion the court to contest Dr. Green's representations, the "shadow counsels" were never lawfully a party to the case and thus were never identified. As they made no appearances, filed no applications and signed no court documents, they did not violate any ethical cannons as lawyers.

As the abuses caused by the defendant's failure to comply with the FRCP were so numerous, so timely, and so costly, the implementation of a court room procedure more common in criminal trials by criminal prosecutors, was necessary to "secure the just, speedy, and inexpensive determination of every action," as governed by FRCP, Rule 1.

Because the defendants failed to contest the representation of plaintiffs during the trial, but contested the representation at the appellate level, they acknowledged to the court that they were aware of the defense available to them, but chose not to use it during the lawfully provided time. In doing so, they provided evidence to the court they had knowledge of their rights, and the consequence of default, in the lower court when they waived them, under Rule 12h. Their actions did not preserve the defendant's rights on appeal.

As the claims of the other included parties survived the caption of the final order, four times, both the public and all future judicial authorities must assume they were addressed and properly represented.

By their actions, the defendants are continuing an Illinois pattern, that says "Judge, I'm white. The defendant is black. I didn't follow the law. Cover me on this one. Appellate court, if you can't find a way to rule in my favor, don't rule at all. You have the discretion to do so." Regardless of the court's purpose or intent, the failure of the defendants to comply with the FRCP casts doubt on the integrity of the subsequent decision.

The authority of the appellate court, mandated by the U.S. Supreme Court, to insure a fair and equal application of all laws and procedures for all U.S. citizens remains the controlling authority. The application of default and default judgement for all relief sought as filed in compliance with FRCP Rule 55a, is consistent with that mandate. The appellate court order to remand, dismiss and abstain rehearing for the Illinois defendants is in error. The order to affirm and abstain the favorable ruling given to HCSC is likewise, in error.

3. **The appellate court erred when it remanded a case to the district level for implementation of a law, based on the Younger Abstention, that while relevant during trial, was not applicable at the time of the district court's decision.**

The appellate court's decision prevented the plaintiffs due process in that the plaintiffs could not foresee that a law not valid in application could be used to violate their rights without notice or a hearing.

The appellate court erred when it affirmed the district court's decision for HCSC accepting the written statement) that they had filed a lawful answer on May 16, 2000 in response to the court's Minute Order of April 26, 2000. The court docket includes no such defendant entry for that date and the defendants did not claim error or mistake in either the district or the appellate court proceedings.

The appellate court further erred when it ruled that the

Illinois defendants should have been permitted to abstain from the proceedings under the Younger Abstention *(Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746 *(1971)* as the Illinois defendants had petitioned.

The appellate court's ruling to vacate and remand grants the Illinois defendants rights to which they are not lawfully entitled because of the default and presumes that the plaintiffs could not have prevailed, had a hearing on the Younger Abstention and the plaintiff representation been properly noticed.

The defendants never sought such hearings or a ruling on the Younger Abstention, and more importantly, did not motion the court to accept their objections under previous complaints, which included the abstention argument, to the moving Second Amended Complaint. There was not, therefore a lawful application before any court regarding the Younger Abstention. The plaintiffs were not required to demand a hearing to prove that the defendants lacked foundation or jurisdiction for their defenses, as the defendants were in default.

More significantly, at the time the district court issued its appealable ruling, January 31, 2001 and June 4, 2001, the Younger Abstention was not available as a defense. The state courts had dismissed the state action January 17, 2001. (Appendix D.)

The appellate court erred when it used its discretionary power to assume that such a hearing, if requested, would have resulted in abstention. The appellate court further erred when it ruled that the plaintiffs were required to bring their 14th Amendment claims in their state administrative appeal, when the purpose for raising claims and the existence of the 42 U.S.C. secs. 1981 and 1983 was to remove to the federal courts, violations in the state court that denied due process in those courts.

4. **The appellate and district courts erred when not requiring certification of a state law whose conflicts affected the health and welfare of millions of Illinois citizens and thousands of psychologists throughout the state.**

In both the district and the appellate court pleadings, the plaintiffs asked the court to take notice of two different and conflicting state documents. The state legislature granted authority to discipline psychologists to the "Department of Registration and Education", "Effective January 1, 1989".(5352, Chapter 111, Profession and Occupations, paragraphs 2, subparagraphs (1)(2)State of Illinois.) Without notice of a change or justification, the "Department of Professional Regulation" assumed those responsibilities, contrary to the state law. In all published materials, e.g. the official department brochure for "The Clinical Psychologist Licensing Act," IDPR restates that authority, citing P.A. 85-947, certified December 2, 1987, effective January 1, 1989, and "As amended by P.A. 85-1305,"Effective January 1, 1989." as the Department of Professional Regulation, which is not the law.

The plaintiffs asked the appellate court for a certification of state law question to determine which state department had lawful authority, but that motion was denied. As the appellate court felt the district court had authority to dismiss the Illinois defendants under the Younger Abstention, a certification of that question was therefore moot. However, as HCSC had contracts with Dr. Green and his companies, based on licensure by the Illinois Department of Registration and Education, not the Illinois Department of Professional Regulation which removed his license, and as they continued to withhold $580,000 in reimbursements under an unlawfully breached contract, that question still required clarification for the remaining Wisconsin defendants in this case.

The appellate court, in denying the plaintiff's petition for Certification of State Law Question closed out the opportunity to establish "extraordinary circumstances" even had the Younger Abstention been available. The Illinois Department of Professional Regulation lacks authority under the Illinois Legislature to revoke or discipline any clinical psychology license that was given to the Department of Professional Regulation without a notice and hearing to all affected parties, which the Illinois defendants did not show occurred.

HCSC knew or should have known of this process violations as it acted on them by withholding Dr. Green's provider reimbursements of $580,000 because of the license removal, which they freely admit in their pleading as evidenced by the district court order. The appellate court cannot state with a certainty, that there was no communication, and therefore no conspiracy, between HCSC and IDPR when HCSC admits it acted on information only IDPR could provide.

Under simple contract law, the defendants were limited by the plain meaning rule. (*Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998).

Summary

The role of this and all lower courts in the face of a properly noticed hearing for default judgement is clear. However, the failure of this court to rule on discretionary departures that deny due process, and intentional FRCP violations that obstruct justice while allowing government official to retreat to professional immunity protections are not. The failure of this court to address these issues at this time, would grant Illinois police, prosecutors and court officials the right to continue to alter the letter of the U.S. Constitution, that *Marbury v. Madison* (1803) and *Furman v. Georgia*(1972) sought to deny. There should be no constitutional immunity to claim negligence when there is knowledge or intent to do harm,

or escape sanctions from the commission of knowingly harmful acts, when due process violations could have been avoided.

If a proper answer had been filed, and hearings properly noticed and held there is no evidence to suggest the plaintiffs could not have prevailed before a hearing on all procedural objections or the final trial by jury. The trial court erred and abused its discretionary powers, when it denied the plaintiffs a trial by jury on the merits, in violation of its own circuit ruling, *Hampton v. Hanrahan* (1981). The district court lacked discretionary authority to dismiss the proceedings following a default, and the appellate court lacked discretionary authority to abstain from a rehearing on evidence of a denial of due process. By doing so, the district and appellate courts effectively transferred their judicial immunity to the defendants.

The defendants have no new rights under appeal that they did not enjoy during the trial phase, and any errors related to the filing of an appearance cannot be construed as anything but inadvertent, since the court and all defendants knew by the caption and the applications that "Theophilus Green" represented the interests of the other plaintiffs. There is no evidence on file to suggest that the inadvertence was material to the denial of due process for the defendants.

Once the court issued its final order with the other included plaintiffs in the caption, and the clerk entered the final judgement with the other included plaintiffs in the official docket summary, and once the plaintiffs filed a properly noticed motion for default judgement, and the defendants were in default for more than a year, this case was a finality. Dr. Green is by default, the lawful representative of all plaintiffs, for all issues related to sanctions and default, and the default judgment, provided proper notice of hearing. That hearing was held and the defendants took no action to objection to the hearing, correct the default, or appeal. The default judgment must be entered as a matter of law and RICO sanctions due apply.

Further, if the district and appellate court decisions were affirmed, it would mark a return to the 19th century standard of two forms of justice, under *Plessy v. Ferguson,* 163 U.S. 537 (1986), which this court struck down in *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954); 349 U.S. 294 (1955 (1954). Finally, it would effectively deny a litigant the benefit of counsel, which this court protected under *Gideon v. Wainright,* 372 U.S. 335 (1963). If police, a prosecutor or representative before the court could knowingly ignore due process protections, then assert the defense of immunity, it would render any legal representation null and void.

The Attorney Registration and Disciplinary Commission, the disciplinary authority for all attorneys in Illinois, like similar agencies in all states, will not accept a complaint based on evidence of fraudulent filings and violations of Rule 11, without a ruling from the court that those pleadings are in fact false. That determination is discretionary to the court, the law is not.

The counsel in this case counted on, relied on, expected and predicted, that judicial discretion would cover them when procedural fraud and intentional disregard for the law and the court's order could not justify their legal recklessness.

Dr. Green stated in his appellate action and restates here that the conspiracy alleged in this claim was life threatening, that he enjoyed no protections for his constitutional due process rights at the state or federal level, and that revealing any further information about his professional credentials or seeking greater relief of his rights violations at the state level could only have triggered additional 14th Amendment violations and forced him as well as the other plaintiffs, to abandon their constitutional rights to trial.

For Dr. Green to obtain justice under the law, it was necessary for him to withhold his knowledge of the law. It is a conundrum made necessary by abuse of discretionary privilege in Illinois, applied in an unfair way sexually, racially, and professionally, in defiance of the U.S. Constitution with

knowledge of the highest legal authorities.

Conclusion

This case should be remanded to the district court for expeditious execution of the default judgement for all captioned parties on all relief as sought, and a hearing on sanctions and RICO penalties. This case should be remanded to the 7th Circuit U.S. Appellate Court to instruct the state court for a speedy Certification of State Law Question to permit trial for the remaining defendants.

The petition for a writ of certiorari should be granted on the remaining issues of discretionary privilege that violate due process and the issue of mandatory appellate rehearings on notice of legal defect, so that this case may continue its proper course to resolution.

Respectfully submitted,

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